No. 04-180

Supreme Court, U.S
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In The
Supreme Court of the United States

GEORGE E. BURLESON,

Petitioner,

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON,

Respondents.

On Petition For Writ Of Certiorari To The Appeals Court Of The State Of Mississippi

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

I. When an insurer threatens to increase renewal costs unless the County fires a sheriff's deputy, who has in one year instigated or executed two false arrests that resulted in suits against the county, does due process demand that the sheriff afford the deputy who refuses to discuss the discharge a pre-termination hearing?

II. Where a discharged sheriff's deputy agrees to continue his post-termination hearing, may he complain that the hearing was not held in a timely fashion?

III. Where the state courts have held that the deputy was only disciplined once, should this court review an allegation that state law was violated by disciplining him twice?

IV. May a deputy who was allowed cross-examination at a first hearing and who did not object to the absence of cross-examination at a second hearing where he testified, claim the absence of cross-examination denied him due process, where he also does not dispute the facts upon which the discharge was based?

V. Is a federal question raised where some of the Civil Service Commission's investigation was allegedly *ex parte* in violation of state law but substantial on-the-record evidence supported its findings?

VI. Is a federal question raised where it is alleged that the terms of Civil Service Commission members had expired when they rendered their decision, a claim not raised before the Commission and a claim that ignores the "de facto" authority of state officers whose authority is later challenged?

QUESTIONS PRESENTED – Continued

VII. Where a statute sets out grounds for discharge, i.e., "inattention to duty, incompetence and discourteous treatment of the public," can an employee claim he did not have notice that the Commission, when ordered to make additional findings, would conclude that his involvement in the false arrests met that standard?

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INTRODUCTION

Because of a series of multi-million dollar verdicts that began in 1995, Mississippi has suffered a crisis in the availability of liability insurance, particularly for physicians and, to a lesser extent, for public entities whom juries are tempted to view as "deep pockets."

This case arises out of the difficulty Hancock County had in obtaining liability insurance in 2000. Citizens filed lawsuits for false arrest after two separate 1999 incidents involving Petitioner, former Sheriff's Deputy George E. Burleson. After the first suit was filed, the deputy was moved from a job that included investigation to a patrolman's job. *Burleson v. Hancock County Sheriff's Department Civil Service Comm'n*, 872 So.2d 43, 47 (Miss. Ct. App. 2003); Pet. App. 3.

Then another suit was filed. The County's liability insurer said that, if the petitioner deputy was not fired, it would substantially increase the deductible because, unlike any other member of the sheriff's department, he had been the cause of two suits in a one-year time frame. 5:21.[1] The sheriff consulted with the county attorney. He handed the deputy a discharge letter and offered to discuss it with him, but the deputy just walked out. 5:62. The state Civil Service Commission found, and the record before it supported, that the discharge was in good faith and for cause. The deputy does not deny that he was involved in the incidents nor does he deny that the insurer made the demand.

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[1] The Mississippi Supreme Court record is cited here as "volume:page."

Under these circumstances, the process that Hancock County gave him was more than sufficient to protect his right to due process. Even if that were not the case, this case presents no issue worthy of certiorari. The deputy mostly complains that the Mississippi Court of Appeals did not follow the state law decisions of the Mississippi Supreme Court or Mississippi regulatory law. That does not present a federal question. And on the facts of this case the federal questions are not substantial ones – for example, the petitioner deputy never objected to the inability of the parties at a hearing to cross-examine witnesses and did not raise the issue until his second appearance at the Mississippi Court of Appeals.

STATEMENT OF THE CASE

1. Proceedings and disposition in the lower courts.

The exact posture in which this case arises is as an appeal from the Hancock County Civil Service Commission, which found that the petitioner deputy was terminated "in good faith and for cause." Pet. App. 23. The Circuit Court of Hancock County, acting as an appellate court, found that substantial evidence supported the Civil Service Commission decision.

Then a second appellate court, the Mississippi Court of Appeals, remanded the case to the Civil Service Commission with a request that it make factual findings. It did so. Pet. App. 20-23. The case went back to the Court of Appeals, which affirmed the Commission's decision. *Burleson, supra*; Pet. App. 1-17. The Mississippi Supreme Court denied review. *Burleson v. Hancock County Sheriff's*

Department Civil Service Comm'n, 873 So.2d 1032 (Miss. 2004); Pet. App. 31.

The Petitioner's statement of proceedings is generally correct insofar as it actually discusses proceedings. This Court should, however, disregard the invective the deputy and his supporting policemen's union direct both at those who supervise law enforcement officers, and at citizens who exercise their constitutional rights to sue deputies or police officers who injure them.

The statement is incorrect, however, with respect to its discussion of the cross-examination issue. The Civil Service Commission held two hearings where witnesses testified. At the first hearing, the county attorney testified about his conversations with the insurer and the sheriff who fired the deputy. The deputy's counsel, retained for him by the Southern States Policemen's Benevolent Association, cross-examined the attorney at length on such subjects as the likelihood that damages for false imprisonment might be no more than $5.75 per hour. 6:29. *See* 6:21-42.

At the second hearing, where the deputy in 2001 testified along with others, the Commission chairman announced that there would be no cross-examination. The deputy's counsel objected to the testimony of a witness not listed in pre-hearing disclosures, but did not object to the lack of cross-examination and never asked to cross-examine any of the witnesses at the hearing. 5:17. In fact, as late as the Brief of Appellant Captain George E. Burleson filed in the Mississippi appellate courts on Oct. 23, 2002, a year after the hearing, the failure to allow cross-examination was not included in the deputy's list of 20 issues.

The issue made its way into the case only when the deputy appeared two years later in the Court of Appeals after the remand to the Civil Service Commission. Even if this Court wanted to consider the cross-examination issue, there is no record here to support such a consideration.

2. Statement of facts.

The respondents dispute all statements of "fact" in the Petition which are not supported by the Appendix to the Petition. Of the five statements of fact the petitioner deputy lists by number, all but number three are true as stated, but they omit facts critical to the consideration of the constitutional issues. As to number three, the transfer was not a demotion. *Burleson, supra*, 872 So.2d at 48; Pet. App. 5-6, 20.

The relevant facts, as found by the Civil Service Commission and as found in the record before that Commission, are as follows:

The false arrests. In 1999, when the seller of a car complained to the petitioner deputy that a buyer had failed to make payments on a note, the deputy told her it was a civil case but offered his opinion that the buyer might be guilty of false pretenses. He then personally typed out an arrest warrant, and told the seller how to file it to have the buyer arrested. The seller did that. The deputy put the charge in the NCIC computer. The police in another state arrested the buyer and held her in jail for 12 hours. When the sheriff heard about the arrest, he called the other state and had the buyer released. As it turned out, the payments had been made. The buyer sued the sheriff and the county for false arrest. *See* 5:9-10, 49-51; 6:10-12.

In the same year, a property caretaker reported the identification number of a vehicle abandoned on his employer's property. He met with deputies who examined the vehicle. The next day he heard on the radio scanner that the sheriff's department wanted the vehicle towed in so he went out and got it and started towing it in. The petitioner deputy showed up, got in a dispute about who was to tow the car, and had the caretaker arrested for possession of stolen property. 5:1-13, 71-74; 6:13-15. Again, the sheriff had to intervene to get the man released from jail. *Id.* Another suit was filed.

The discharge. In 1999, after the car buyer sued, the sheriff changed the deputy's job assignment from one that involved investigation and monitoring the radio to one that kept him on patrol. The Civil Service Commission and the Mississippi courts found this was not a demotion, Pet. App. 20, and the deputy did not treat it as such, i.e., he did not appeal the decision within 10 days.

Then in January 2000, the man with whom the deputy had argued sued. When the county insurance came up for renewal, the insurance company identified the deputy as a "multiple claim" risk because his conduct had resulted in two suits being filed within the past 12 months. He was the only such risk in the department. The insurer said it would have to increase the deductible if he remained on the force. 6:19.

The sheriff, as required in the absence of a full pre-termination hearing, offered him a post-termination hearing. He asked for a hearing within 20 days, did not get it, but then did not object to several continuances. *Burleson, supra*, 872 So.2d at 49; Pet. App. 9.

The hearings. A total of six people, including the discharged deputy, testified at the Civil Service Commission hearings. They testified to the facts stated above. The county attorney told the Civil Service Commission that he believed plaintiffs in both of the pending suits would get a directed verdict on liability. 6:15. The petitioner's counsel chose not to cross-examine him on that point, and instead concentrated on damages and qualified immunity. The sheriff who fired the petitioner said " . . . I always had a policy that you investigate, and then arrest. I think Investigator Burleson at that time was doing a lot of investigating before he was arresting." 5:13.

The Civil Service Commission findings. Under the special legislation which governs the Hancock County Civil Service Commission, the sheriff had the right to discharge the deputy for the conduct in the lawsuits if it reflected "inattention to duty", "incompetence" or "discourteous treatment of the public." Pet. App. 43. The sheriff had the right to do so without a pre-termination hearing if continued employment was "detrimental to the interest of the county government or the sheriff's department." Pet. App. 43. Finally, the Commission is to uphold the decision to discharge the deputy if it found that the discharge was "made in good faith for cause." Pet. App. 43.

The Commission found that the discharge squared with the legislative requirements for discharge:

> The Commission finds that George E. Burleson showed inattention to duty, incompetence, and discourteous treatment of the public, as well.

Pet. App. 21. It also found grounds for not giving the deputy a pre-termination hearing:

> The actions by [petitioner deputy] George E. Burleson in the Poole and Benvenutti cases (two citizens arrested by George E. Burleson) and resulting lawsuits against Hancock County and the Sheriff's Department, placed the Sheriff's Department and the County in danger of immediate injury to the County by losing its insurance if George E. Burleson were to continue in his employment. . . .

Pet. App. 21. Finally, it also found the discharge was in good faith:

> The Commission finds the termination of George E. Burleson was made in good faith and for cause, was supported by substantial evidence and was not made for political or religious reasons. (Note: George E. Burleson testified that he campaigned for [the new sheriff who fired him]).

Pet. App. 22.

In the Mississippi Court of Appeals, the petitioner deputy did not seriously challenge the accuracy of the facts concerning the lawsuits and insurance except to complain that he did not actually file the warrant that had the car buyer arrested, and to say that the caretaker needed arresting.[2]

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[2] *See* Reply Brief for the Appellant Captain George E. Burleson, filed March 2003 in the Mississippi Court of Appeals, pp. 17-18.

REASONS FOR DENYING THE WRIT

I. The petitioner deputy received all the process that was due him under the due process clause.

The petitioner deputy has wholly failed to show what good additional process would have done him. As a result, he has no due process claim.

As stated in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), the process that is due depends on three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest. . . .

Here the deputy had an interest in his job, but the County had an interest in expeditiously removing him so it could renew its insurance at a reasonable price. As long as the statements by the insurer were sincere and were correctly reported – and there is no doubt that they were – the deprivation could not be shown to be "erroneous," even if the deputy were given 10 more hearings to dispute the exact degree to which he was responsible for the lawsuits.

In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 542, 543 (1985), this Court held that some opportunity to be heard before termination was required where there were "arguable issues." But it suggested such an opportunity was not always required, particularly where an employee's side of the story was not needed to provide a "hedge against erroneous deprivation." *Id.* at 543 & n.8, *citing Dixon v. Love*, 431 U.S. 105, 113-114, 97 S.Ct. 1723 (1977). *See Mount Healthy v. Doyle*, 429 U.S. 274 (1974)

(no claim if same decision would have been reached absent constitutional violation).

More recently, in *Gilbert v. Homar*, 520 U.S. 924, 933-34 (1997), this Court repeated that due process is a flexible concept, and suggested the risk of an initial erroneous deprivation was slight when the employer relied on a third party's decision to arrest the employee and charge him with drug violations.

In this case, two plaintiffs had brought suit, the prior sheriff had been personally involved and had interviewed the petitioner deputy, 5:10-13, an insurer had accepted coverage, an attorney was defending the county and, in their collective opinions, the cases were good cases insofar as liability was concerned. The sheriff who fired him acted on recommendations that were ultimately based on all these opinions, even though he personally was not intimately familiar with the incidents. 5:10-13; 25; 39-40. It is difficult to imagine how further process could have benefitted the petitioner deputy. Certainly neither the briefs below nor the Petition for Writ of Certiorari provide any enlightenment on that point.

In fact, the deputy has never made any argument, much less a factual showing, that a pre-termination hearing, or more process at a post-termination hearing, would have helped his situation. Because he did not object to the "no-cross examination" rule, he did not attempt to cross-examine the witnesses for the purpose of a proffer only, or offer an affidavit from a non-witness that called into question the relevant testimony. As the Court of Appeals noted he also did not attempt to recall the witnesses as his own witnesses for the purpose of examining

them further. *Burleson, supra*, 872 So.2d at 50; Pet. App. 11.

To illustrate how abstract the deputy's claim is, it is worth comparing an allegedly conflicting case on which the amicus union relies, *Garraghty v. Commissioner of Va. Dep't of Corrections*, 52 F.3d 1274, 1284 (4th Cir. 1995). There the discharge rested on allegations of sexual harassment, which required resolution of a "he-said she-said" dispute between two persons with "bad blood" between them. In that context, the Fourth Circuit said the terminated employee should have a right to cross-examine witnesses.

But here there is no dispute as to what the insurer demanded. In addition, that demand is facially supported by the two complaints, introduced into evidence at the hearing, and the insurer's duty to defend and pay for the county's liability if the suits should be successful.

Because the deputy has not shown what good additional procedures would have done him, he has not made out a claim for deprivation of due process.

II. A lower state court's alleged misapplication of its own law does not present a federal question, nor does an alleged confusion within the Mississippi court system on a federal question merit certiorari.

Several of the questions that the petitioner deputy raises are either questions of state law, or are federal allegations that the facts just do not support and that attack an inferior state court decision. This Court has no

power to correct the first kind of question, and it has more important things to do than the resolve the second kind.

For example, the deputy asked for a hearing within 20 days, but then agreed to several continuances that stretched out the hearing process for several months. The 20-day requirement is a requirement of state, not federal law, and, even if that were not the case, the continuances are a state law waiver of any speedy hearing right.

Similarly, the complaint about being disciplined twice for the same thing is not only not true – the transfer was not discipline and the insurer's demand was not made until after he was transferred and another suit was filed – but it too arises under state law, not under federal law. The federal Double Jeopardy Clause applies only in criminal cases.

Third, the allegation of *ex parte* contacts is an odd one: apparently the Commission asked the county attorney and administrator to explain the matter before it held its hearing sometime later. 6:38. That did not violate the statute governing the Commission's proceedings and, even if it did, it does not present any federal question. The evidence at the official hearing supported the result. And the claim that the Open Meetings Act was violated is frivolous. That act contains a specific exemption that allows closed sessions for the purposes of "investigative proceedings by any public body regarding alleged misconduct . . ." Miss. Code. Ann. § 25-41-7(d). *See also* §§ 25-41-7(a) (personnel matters exemption), (k) (job performance exemption). Even if it did not, Mississippi does not invalidate official actions taken in violation of the law.

Nor is there any merit to the assertion of "unnoticed" charges of misconduct. The findings about which the petitioner deputy complains are inherent in any discharge, because they are things the sheriff had to prove in order to justify the discharge under the local Civil Service law. All the petitioner had to do was look at the law to be on notice of them.

Finally, the argument about Commission jurisdiction was not made to the Commission when it could have fixed the problem. The state courts held that it was waived. *Burleson*, 872 So.2d at 51. It is also wholly meritless, because Mississippi recognizes the validity of acts performed by "de facto" officials – those who hold office by claim of right but are later found not to have been fully qualified. *See* Miss. Code Ann. § 25-1-37 (acts of a de facto officer valid).

III. Neither the petitioner nor the amicus have identified any issue of exceptional importance.

Perhaps there is no respondent who does not believe that a petition depends on its unusual facts. But it is true that this Court has demanded a fact-specific inquiry in due process cases. For that reason, to create a conflict with the decisions of other courts, there must be a demonstrably common fact pattern.

The fact pattern here is different from that of all the cases cited by the petitioner and the amicus. Here the decision was not made by the employer on its own but was one suggested by an insurer with which the County has a contractual duty to cooperate and a financial need to

appease. Neither the petitioner nor the amicus have identified any case where the discharge depended in part on a third-party's beliefs concerning the liability risk that continued employment would pose.

Moreover, the conflicts claimed are thin. Many cases have gone into the books since *Loudermill*, yet the petitioner claims a conflict only with that case and some Mississippi cases he says have correctly applied it. The only flat conflict the amicus claims is with *Garraghty*, and it is readily distinguishable. One of the cases to which the amicus alludes, *Mitchell v. Frankhauser*, 375 F.3d 477 (6th Cir. 2004), supports the respondents. It says that a meaningful post-termination hearing can make up for an abbreviated pre-termination process and, without discussion, lists post-determination procedures that do not include cross-examination.

Finally, even the cross-examination question is not clear cut, because some cross-examination was allowed, state law does not prohibit cross-examination, the petitioner deputy's counsel did not ask for cross-examination, and the deputy has made no attempt to show how cross-examination or other process could have prevented him from being discharged.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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